

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KAREN PAMELA SIMMONS,

Defendant-Appellant.

UNPUBLISHED

July 21, 2011

No. 297928

Wayne Circuit Court

LC No. 09-018279-FH

Before: M. J. KELLY, P.J., and O'CONNELL and SERVITTO, JJ.

PER CURIAM.

Following a jury trial, defendant appeals by right her convictions of possession of cocaine with intent to deliver, MCL 333.7401(2)(a)(iii); possession of cocaine, MCL 333.7403(2)(a)(iii), and possession of marijuana, MCL 333.7403(2)(d). We affirm.

In defendant's first trial on these charges, the trial judge declared a mistrial because of defense counsel's alleged misconduct while delivering his opening statement. The trial judge told defense counsel that his opening statement "hit below the belt" because the comment implied that the prosecutor was sandbagging or was acting nefariously. The judge stated, "I don't know how to get the cat back in the bag." The judge concluded that the only remedy was to declare a mistrial.

Defense counsel subsequently asked the judge to dismiss the case on double jeopardy grounds. The judge denied the request. At the conclusion of the second trial, the jury convicted defendant on all three counts.

Defendant's double jeopardy challenge presents a question of constitutional law, which we review de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). Both the United States and the Michigan Constitutions provide protection for a criminal defendant from twice being put in jeopardy for a single crime. US Const, Am V; Const 1963, art 1, § 15. The right against double jeopardy has three distinct protections: protection from multiple prosecutions for the same offense after acquittal, protection from multiple prosecutions for the same offense after conviction, and protection from multiple punishments for the same offense. *People v Torres*, 452 Mich 43, 64; 549 NW2d 540 (1996), citing *United States v Wilson*, 420 US 332, 343; 95 S Ct 1013; 43 L Ed 2d 232 (1975).

Jeopardy in a jury trial generally attaches when the jury is selected and sworn. *People v Henry*, 248 Mich App 313, 318; 639 NW2d 285 (2001). Thus, the double jeopardy right protects a defendant from multiple prosecutions even where, as in this case, there has been no previous determination of the defendant's guilt or innocence. *People v Grace*, 258 Mich App 274, 279; 671 NW2d 554 (2003). However, when a trial concludes prematurely, retrial does not offend the constitutional right against double jeopardy if (1) the defendant freely consented to the interruption, or (2) there existed manifest necessity for declaring a mistrial. *Id.* Defendant here did not consent to a mistrial. Accordingly, we must determine whether there was a manifest necessity for the mistrial.

In *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994), this Court stated that manifest necessity "appears to refer to the existence of sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial or make its completion impossible." Manifest necessity is also clear in situations where a procedural error in the trial would warrant reversal after conviction. *Id.* A trial court's failure to consider alternatives, however, precludes a determination that manifest necessity justified declaring a mistrial, unless a reviewing court can conclude that no reasonable alternative existed. *People v Hicks*, 447 Mich 819, 843; 528 NW2d 136 (1994).

Turning to the instant case, defendant argues that declaring a mistrial was not manifestly necessary for three reasons: (1) no impropriety occurred; (2) assuming an impropriety, a curative instruction would have eliminated any resulting prejudice; and (3) the trial judge failed to consider alternatives to a mistrial. We disagree.

First, defense counsel's statement during opening argument was improper. Defense counsel indicated in opening statement that the credibility of police officers was at issue. Counsel continued,

Folks, like I said you're going to be called upon to judge the credibility of what these officers are saying. The other thing, too. Now we've found out something, I've found out something brand new for the first time and I really don't have an answer for it. I found out this coming Thursday, last Thursday that they now claim them [sic] have a video tape of her.

This statement asserts, in essence, that the prosecutor withheld a significant piece of evidence until shortly before trial. The record contains no support for the assertion. Accordingly, the statement was improper.

Second, the statement was prejudicial, in that it challenged the prosecutor's integrity. Third, the trial judge considered whether a curative instruction could resolve the impropriety. The judge concluded, as do we, that a curative instruction could not restore the damage from the improper statement.

In sum, the record demonstrates that after hearing the parties' arguments and considering alternatives to a mistrial, the trial court correctly determined that a mistrial was necessary. Because there was no reasonable alternative to a mistrial, the trial court correctly concluded that the double jeopardy protections did not bar retrial.

Affirmed.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Deborah A. Servitto